F.M.S. REPORTS

[APPELLATE CRIMINAL JURISDICTION]

WHITLEY, Ag. C.J.

November 4, 1937

PUBLIC PROSECUTOR Appellant

vs.

LEE PAK Respondent

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 62 of 1937]

Criminal procedure—summary trials—framing of charge—evidence—absolute right of witness to re-examine himself—certain witnesses not called—no adverse presumption—testing of brakes—no expert evidence required—Evidence Enactment, Section 114, Illustration (g).

Observations on procedure in summary trials.

A charge should be so drawn that the accused should know exactly the case which he has to meet and that he should not be left guessing as to which of a number of alternatives he is alleged to have offended against. If a charge is so badly framed that the accused is misled thereby, an appellate court will have no hesitation in quashing a conviction based on such a charge.

Where a witness conducting his own case is cross-examined, it amounts to a denial of justice to prevent him, if he so desires, from re-examining himself with a view to amplifying or clarifying the answers which have been extracted from him under cross-examination.

In a summary trial, it is not incumbent upon the prosecution to call or produce all the witnesses from whom statements have been taken. If it is considered that their evidence if given will throw no light on the case, no unfavourable inference will be drawn against the prosecution if such evidence is not called at the trial.

The accused appellant was charged under Section 45 (iv) of the Motor Vehicles Enactment (Cap. 168) with using on a public thoroughfare a bus the condition of which was likely to be dangerous by reason of the fact that the brakes and steering were out of order. The Officer Commanding Police Station, Rawang, tested the brakes of the bus in question and gave evidence that they were defective. The evidence was objected to by the defence on the ground that the witness was not an expert.

Held on appeal, that anyone with a sound working knowledge of motor cars is competent to testify as to whether the brakes he has examined and tested are in a condition likely to be dangerous within the meaning of Section 45 of the Motor Vehicles Enactment.

MAGISTRATE'S CRIMINAL APPEAL.

M. C. Hay, Deputy Legal Adviser, for Public Prosecutor, Appellant.

W. G. W. Hastings for the Respondent.

Cur. Ad. Vult.

WHITLEY, AG. C.J.—This appeal by the Public Prosecutor, F.M.S., against an acquittal by the Rawang Magistrate raised several important points, and I was fortunate in having the case very ably presented to me and argued by the Deputy Legal Adviser, Mr. Hay, and by Mr. Hastings on behalf of the respondent.

The respondent was charged under section 45(iv) of the Motor Vehicles Enactment (Cap. 168) with using upon a public thoroughfare a bus the condition of which was likely to be dangerous by reason of the fact that the brakes and steering were out of order. Before dealing with the evidence I should like to make some observations upon the subject of the framing of charges. I have had to deal with a number of criminal appeals lately, and I have observed that in several cases the charges have been carelessly drawn. Prosecuting officers should devote great care to this part of the preparation of their cases, studying and following the provisions of Chapter XVIII of the Criminal Procedure Code. It is seldom sufficient to copy the section under which the charge is being laid slavishly word for word. The wording must be adapted to the facts of the particular case. The charge should show the accused exactly and with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offended against. It is desirable that before the charge is put to the accused the Magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed; and if at the close of the case for the prosecution or indeed at any other stage of the trial it becomes apparent to him from the evidence that the charge should be altered, section 158 of the Criminal Procedure Code gives him power to alter it or add to it at any time before judgment, provided always that such alteration or addition is read to the accused. In the present case there were obvious defects on the face of the charge. It did not allege that the respondent was driving a motor vehicle which was an essential ingredient to constitute an offence under the section; it apparently alleged that the thoroughfare and not the vehicle was in a dangerous condition and it alleged that the steering was "similar" which is not a word which should appear in a formal charge. It was not suggested that these errors in wording in any way misled the accused, so that they are covered by section 156 of the Criminal Procedure Code which provides that such errors shall not be regarded as material. Prosecuting officers should none the less bear in mind that a badly drafted charge may mislead and that if it should appear to an appellate Court that an accused person was in fact misled, that will of itself justify the quashing of a conviction.

I now turn to the facts of this case. The Officer Commanding Police Division, Rawang, Mr. Harrison, conducted the prosecution and was the principal witness. He stated that he examined the bus at the scene of the accident in the presence of the accused who was its driver. He found that the foot-brake would not hold the bus on a piece of dry flat road when nine Malays pushed it from behind and that the hand brake would not hold the bus on a slight incline which he estimated as 1 in 30. The Magistrate unfortunately misunderstood what the witness said and recorded his estimate as 'one inch in 30 feet.' The witness was cross-examined at length by Mr. Sharma, defending counsel, who devoted considerable attention to the question of those passengers in the bus from whom the witness

took statements but who were not called as witnesses or produced in Court. At the end of the cross-examination Mr. Harrison asked to be allowed to give further evidence, but Mr. Sharma successfully put forward the astounding proposition that a witness cannot re-examine himself and the witness was not allowed to clear up points which had arisen out of the cross-examination. This was clearly wrong. Counsel produced no authority for his objection and it would of course be futile for him to search for any in as much as it is only elementary justice that a witness if he so desires should be given a fair opportunity to amplify or clarify the answers which have been extracted from him under cross-examination. Whether the examination in chief has been conducted by counsel or whether, as in this case, the witness is conducting his own case and has, so to speak, examined himself makes no difference whatsoever. He has an absolute right to have the whole of his evidence fully and fairly put before the Court. Examples of witnesses re-examining themselves are of everyday occurrence in the police courts when accused persons elect to give evidence on their own behalf and are, or should be, invariably given the opportunity to add anything they wish to their evidence at the close of their cross-examination. It frequently happens that a cleverly conducted cross-examination leaves a totally wrong impression of the evidence upon the mind of the Court, which wrong impression is completely removed by a few pertinent questions in re-examination.

At the close of the case for the prosecution Mr. Sharma submitted that there was no case to meet. The Magistrate agreed and the accused was acquitted without being called upon to make his defence.

In his grounds of judgment he gave three reasons for discharging the accused. The first was founded upon section 114 illustration (g) of the Evidence Enactment which reads:—

> "The Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it";

He started with the assumption that the accused denied that Mr. Harrison carried out an examination of the bus. He ought not to have assumed that in as much as the accused did not give evidence and accordingly had no opportunity of denying anything. The Magistrate then referred to the fact that three witnesses whose statements were taken by the police were present at the examination of the bus, and though their names and addresses were known, they were not called by the prosecution. From this failure to call them he "drew a strong inference against the prosecution, meaning thereby, I suppose that he felt he was entitled to presume" that the evidence of those witnesses would have been unfavourable to the prosecution. He observed that no explanation was given as to why they were not called. In my opinion no such inference could properly be drawn. It is not incumbent upon the prosecution to call as witnesses all persons from whom statements have been taken. If it is clear that their evidence will throw no light on the case, it would be a sheer waste of time and money to bring them to Court. If the accused should desire to call any such person as a witness he should of course be given the opportunity to do so, no matter what view the prosecution may have taken as to the value of the evidence which he is able to give. This question of to what extent the prosecution is bound to call witnesses was discussed in the case of *Rex* v. *Sanmugam*, 1932 Mal. Law Journal, page 75, where a number of authorities are referred to, but that case only deals with witnesses who have been called at a preliminary enquiry. In a summary trial before a Magistrate the prosecuting officer must of course have a far wider discretion. The real issue in the present case was whether the condition of the brakes was such as to be likely to be dangerous to passengers or others. The three passengers in the bus could hardly be expected to be of any assistance on that point; and in my opinion it would be stretching section 114 much too far to infer from their not being called that their evidence would have tended to show that the brakes were not likely to be dangerous. If Mr. Harrison had been afforded an opportunity of giving further evidence in re-examination as he applied to do and as he certainly should have been allowed to do, he would doubtless have cleared up the matter at once and satisfied the Magistrate that the reason why the prosecution did not call these persons was because their evidence would have been useless. Furthermore, it was always open to the defence to call them if they wished.

The second ground given by the Magistrate was that he was not impressed by Mr. Harrison's evidence, because it seemed impossible for a man to observe with the eye alone a gradient of one inch in thirty feet, and yet he persisted in so describing the incline upon which he tested the hand-brake. This unfavourable view of the evidence was clearly attributable to the misunderstanding, to which I have already referred, as to what the witness actually said.

The last ground given was that Mr. Harrison's evidence as to the condition of the brakes was not sufficient in as much as his only knowledge of motor engineering was what he derived from spending three months in a garage, from which it would seem that the Magistrate took the view that it was incumbent upon the prosecution to call expert evidence in a case of this description. With all respect I am unable to agree with that view. No doubt there are some types of cases which it is impossible or at any rate undesirable to decide without expert evi-

dence, but it seems to me that anyone with a sound working knowledge of motor cars ought to be competent to give an opinion as to whether the brakes which he has examined and tested are or are not in a dangerous condition. If a brake when applied has no effect, it does not require an expert to say that that brake is useless, and if such a test and its results are described to the Court, I can see no reason why the Court should not use its own common sense and draw the conclusion that the brake is in such a condition as to be likely to be dangerous to passengers and others. This last observation disposes also of Mr. Hastings' submission that as Mr. Harrison never in so many words said that the brakes were likely to be dangerous the prosecution failed to establish any case under this section which only creates an offence if the motor vehicle is in a condition "likely to be dangerous." His evidence in my opinion went so far as to show that the handbrake was in such a state as to be practically useless in an emergency and that is sufficient to entitle the Court, if it thinks fit, to infer that such a brake is likely to be dangerous.

I was accordingly of opinion that the prosecution had made out a *prima facie* case, that the defence should have been called upon, and that the case must go back for retrial.

As this was the third case which came before me on the same day in which the Public Prosecutor successfully appealed against an acquittal on the ground that the Magistrate ought to have called upon the defence, and did not, I think it desirable to draw attention to section 173(f) of the Criminal Procedure Code which provides that:—

> "If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal."

In each of these three appeals it was clear from the record that a case had been made out, which if unrebutted would have warranted a conviction. It is not necessary or desirable that I should indicate whether in my opinion the cases were strong or weak ones, but each of them certainly called for an answer.

In Selangor Criminal Appeal No. 55 of 1937 the charge was laid under section 35(i) of the Minor Offences Enactment (Cap. 46) which provides that any person who has in his possession anything which may be reasonably suspected of being stolen or fraudulently obtained is guilty of an offence. There was evidence that the accused was carrying tin-ore on his bicycle and threw it away when called upon to stop by the police. The Magistrate acquitted the accused at the close of the case for the prosecution because there was no evidence that the tin-ore was stolen. There was clear evidence of possession and the accused's behaviour was certainly such as to afford reasonable grounds for suspecting that it had been fraudulently obtained. That being so he ought to have been called upon for his explanation. There was no need to prove that the ore had in fact been stolen. If that had been the allegation the charge would have been one of dishonestly retaining stolen property, an offence under section 411 of the Penal Code.

In Selangor Criminal Appeal No. 68 of 1937 the accused was charged with failing to keep his premises in such a state as not to be a nuisance contrary to Sanitary Board By-law 33(a) Part III, an offence punishable under section 17(ii) of the Sanitary Boards Enactment (Cap. 137). Under that By-law the person liable is the occupier of the premises. Occupier is defined in the Enactment as meaning *inter alia* the person having the charge, management or control of the premises. The evidence showed that the accused was the principal tenant of the house. He told the Inspector that he sub-let the first floor on the passage-way of which the rubbish had accumulated, but there was no evidence that that was so. The Magistrate held that it followed from this statement by the accused that he was not the occupier of the first floor, and acquitted him without calling upon him for his defence. In so holding the Magistrate misdirected himself. The prosecution having proved that the accused was the tenant of the whole house, *prima facie* he was the occupier and had control. It was for him to show that in some way or other he had no control or had parted with control. He could not show this without giving evidence and he should have been called upon. Rather than be put to the trouble of a retrial he asked me to take further evidence and dispose of the case myself. I did so and it became clear that he had only sublet the rooms on the first floor and retained control over the passage which was the only means of access for persons approaching the second floor. I accordingly convicted him of a technical offence. Magistrates should bear in mind that in order to entitle them to call upon the defence it is not necessary that the prosecution should have made out an unanswerable case. It is sufficient if they have made out a *prima facie* case which calls for an answer, and which it is necessary for the accused to rebut.

I have thought it desirable to discuss these cases at some length in the hope that my observations may be of some assistance to the Magistrates in their work. I feel it is only proper that, whilst pointing out mistakes which are not uncommon ones and errors into which it is very easy to fall, I should also put on record the fact that on going through the papers in these and a number of other criminal appeals I have been favourably impressed by the evidence which they disclose of the careful and conscientious way in which the Magistrates are carrying out their difficult duties, and of the fairness with which they appear to treat the accused persons brought before them. *Appeal Allowed.*